perty, whether the plaintiff has had property injured or has been merely kept from the enjoyment of that to which he was entitled, in these, as in other cases, he should recover for the right of which he has been deprived.

The question thus becomes, how shall the value of the right, for which compensation must be made, be estimated? It seems general law that the plaintiff should recover for the fair value of that right, irrespective of whether or no he desired to exercise it. On the one hand he cannot recover an extra amount because of any peculiar value he attached to the right in question. *Moseley* v. *Anderson*, 40 Miss. 49. On the other he is not deprived of compensation to its full value because he was not about to make full use of it. *Patterson* v. *Mississippi Boom Co.*, 98 U. S. 403. The defendant cannot mitigate his liability to pay for the value of the right of which he has deprived the plaintiff by showing that owing to the plaintiff's peculiar situation the actual effect upon him was small. See *Elmer* v. *Fessenden*, 154 Mass. 427. *Storrs* v. *Los Angelos Traction Co.*, 66 Pac. Rep. 72 (Cal.). This principle would seem to apply to all classes of cases. See SEDG., DAM., 8th ed., § 2431. Thus in an action for the wrongful uses of a way, damages were assessed, not by the mere actual injury done to the land, but at what would be a reasonable rent for a license; in other words the fair value of the right. *Jegon* v. *Vivian*, L. R. 6 Ch. App. 742. So in the principal case it seems just that the defendant should pay for the water he has appropriated. The plaintiff was entitled to its flowage, his right was taken away from him, and according to the general rule the fact that he did not care to use the right in no way affects the determination of its value. Moreover if the defendant had to pay nominal damages only, he would be in a better position as a trespasser than if he had rightfully leased the water right. See *De Camp* v. *Bullard*, 159 N. Y. 450. The real injury then, which the plaintiff has suffered is the loss of a right, and his true measure of damages is not merely what that loss has happened to cost him, but its fair market value.

RECENT CASES.

BANKRUPTCY — GENERAL ASSIGNMENT — ALLOWANCE FOR SERVICES OF ASSIGNEE. — *Held*, that an assignee under a general assignment, which was later taken advantage of as an act of bankruptcy, is not entitled to compensation for services rendered prior to the filing of the petition in bankruptcy. *Wilbur* v. *Watson*, 111 Fed. Rep. 493 (Dist. Ct., R. I.).

Under the present Act, general assignments are valid unless followed by bankruptcy proceedings. *In re Romanow*, 92 Fed. Rep. 510; *In re Sievers*, 91 Fed. Rep. 366. The trustee in bankruptcy, however, may avoid the assignment and recover the property. *Davis* v. *Bohle*, 92 Fed. Rep. 325. Although not specifically provided for, this result is correct, being clearly within the spirit of the statute. See 13 HARV. L. REV. 147. The result is reached by treating general assignments as within § 67 *e*, calling them "constructively fraudulent," being "frauds upon the Bankruptcy Act." *In re Gutwillig*, 92 Fed. Rep. 337; *Matter of Gray*, 47 N. Y. App. Div. 554. Since they are not wrongful *ab initio*, and not actually fraudulent, this would seem an unfortunate use of language, which has apparently led the court in the principal case to regard the assignee as a wrongdoer; the allowance being refused because the assignee is regarded as an actor in a fraudulent transaction. The assignee is not one of the creditors of the bankrupt, but since the estate may have received benefit from the assignee's services, the amount of that benefit might well be granted. This was done in *In re Scholtz*,

106 Fed. Rep. 834; *cf. In re Paul Book Co.*, 104 Fed. Rep. 786. Such benefit being rare and its amount generally problematical, the principal decision may perhaps be supported on grounds of expediency. There seems to be very little authority on the question.

BILLS AND NOTES — NOTE FILLED IN FOR UNAUTHORIZED AMOUNT — CONSTRUCTION OF "NEGOTIATED" IN BILLS OF EXCHANGE ACT. — The defendant signed a blank form and gave it to A with authority to fill it up as a promissory note for £15. A made the note for £30 payable to the plaintiff, who purchased it in good faith without notice that it had been signed in blank. The Bills of Exchange Act of 1882, § 20, provides that such a note is not enforceable against the maker unless "negotiated to a holder in due course." *Held*, that the plaintiff cannot recover since a note is not "negotiated" by delivery to the payee. *Herdman* v. *Wheeler*, 18 T. L. R. 190 (K. B.).

Apart from statute, one who signs and delivers a note with the amount left in blank, is liable to a purchaser for value without notice for the sum inserted, though greater than that authorized. *Garrard* v. *Lewis*, 10 Q. B. D. 30; *Bank of Pittsburgh* v. *Neal*, 22 How. 96. The payee may be such a *bona fide* holder just as in all analogous cases where equities exist between the maker and the intermediary. *Fullerton* v. *Sturges*, 4 Oh. St. 530; *cf. Watson* v. *Russell*, 3 B. & S. 34; see 11 HARV. L. REV. 473. The construction given the word "negotiated," therefore, works a decided change in the law. The definition of "negotiated" in § 31 lends some color to this interpretation, and there is a *dictum* in accord. *Lewis* v. *Clay*, 67 L. J. Q. B. (n. s.) 224. Even if technically correct this construction seems too narrow to support such an unfortunate result. The payee in the principal case is substantially in the position of a *bona fide* transferee and should have all the latter's rights. If the same construction were applied to § 29, it would seem that a payee could not be a holder in due course, since by implication such holder must receive the instrument by "negotiation." The court's attempt to avoid this difficulty is not satisfactory. If the construction given is necessary, this case brings out a flaw in the English Act, and in the similar provisions of our own law.

CONFLICT OF LAWS — CARRIERS' CONTRACTS — PUBLIC POLICY. — A steamer ticket containing stipulations exempting the carrier from liability for losses occasioned by negligence, was bought in Belgium where such stipulations were valid. *Held*, that the stipulations are unreasonable, and void as against public policy. *The Kensington*, 22 Sup. Ct. Rep. 102.

In the federal courts and in the majority of the state courts, stipulations on a ticket exempting a carrier from responsibility for negligence are invalid; but in England and on the continent such exemptions are allowed. *New York Central R. R. Co.* v. *Lockwood*, 17 Wall. 357; *Carr* v. *Lancashire, etc., Ry. Co.*, 7 Ex. 707. Cases of transatlantic carriage, therefore, frequently raise the question whether contracts of this sort which are valid where made, will be upheld, when they would be void if made in the jurisdiction where enforcement is sought. In previous cases, the United States Supreme Court has expressly left the question open. *Liverpool, etc., S. S. Co.* v. *Phœnix Ins. Co.*, 129 U. S. 397. Several state courts, however, have given an affirmative answer. *O'Regan* v. *Cunard S. S. Co.*, 160 Mass. 356. The lower federal courts, on the other hand, have almost unanimously adopted the view that is now taken in the principal case. *The Glenmavis*, 69 Fed. Rep. 472; see *The New England*, 110 Fed. Rep. 415. The decision of the Supreme Court may be supported upon principle also. Since foreign law is enforced in any case only because the local sovereign is willing, for that case, to accept it as his municipal law, an exception may properly be made in cases where the foreign law conflicts with the public policy of the state in which the cause is heard. See STORY, CONFL. LAWS, §§ 38, 244.

CONFLICT OF LAWS — EQUITY — ENJOINING TRESPASS IN A FOREIGN JURISDICTION. — *Held*, that equity does not have jurisdiction to enjoin trespass to real estate in a foreign territory, though the parties are before the court. *Lindsley* v. *Union, etc., Co.*, 66 Pac. Rep. 382 (Wash.).

Equity, acting *in personam*, frequently enjoins the commission of an act outside the jurisdiction, where the necessary parties are before the court. *Cunningham* v. *Butler*, 142 Mass. 47. The principal case, however, is based on the analogy of an almost universal rule of law, that an action will not lie for injuries to foreign real estate. *British, etc., Co.* v. *Companhia de Moçambique*, [1893] A. C. 602; *contra*, *Little* v. *Chicago, etc.*,

Ry Co., 65 Minn. 48. Having its origin in a distinction between local and transitory actions depending upon venue, as a rule of territorial jurisdiction it seems purely arbitrary. See *Whitaker* v. *Forbes*, 1 C. P. D. 51 Indeed there seems to be no satisfactory reason to support it. See *Livingston* v. *Jefferson*, 1 Brock. (U. S. Circ. Ct.) 203. There is some authority, with which the principal case is in accord, for applying in equity the rule above stated, on the ground that equity follows the law. *Northern Ind. R. R. Co.* v. *Michigan Central R. R. Co.*, 15 How. 233. There seems, however, to be as much authority the other way. *Alexander* v. *Tolleston Club*, 110 Ill. 65; *Great Falls Mfg. Co.* v. *Worster*, 23 N. H. 462. Since the unfortunate result is reached that the plaintiff is greatly hindered in obtaining adequate remedy, it would seem wiser to disregard the common law rule, to which equity is not generally committed, and to grant the relief which equity has power to give.

CONSTITUTIONAL LAW — CARRIERS — INTERSTATE COMMERCE — LONG AND SHORT HAUL LEGISLATION BY A STATE. — A state constitutional provision forbids a carrier charging more for a short haul than for a long haul within which the short one is included. *Held*, that in cases where the long haul is an interstate haul, and the enforcement of the provision would compel the carrier to raise his rate for that haul, the provision is an interference with interstate commerce and not enforceable. *Louisville & Nashville R. R.* v. *Eubank*, U. S. Sup. Ct., decided Jan. 27, 1902. See NOTES, p. 570.

Held, that in cases where both hauls are within the state limits, the provision is not in conflict with the federal constitution. *Louisville & Nashville R. R.* v. *Kentucky*, 22 Sup. Ct. Rep. 95. See NOTES, p. 570.

CONSTITUTIONAL LAW — FOREIGN INSURANCE COMPANIES — REGULATION BY STATE STATUTES. — Mass. St. 1894, c. 522, § 98, imposes a fine upon any person acting "in any manner in the negotiation or transaction of unlawful insurance with a foreign insurance company not admitted to do business within the Commonwealth." The defendant was employed as agent in Massachusetts by the owner of Massachusetts property to negotiate insurance thereon outside the state. *Held*, that the statute, as interpreted to cover the defendant's case, is constitutional. *Nutting* v. *Massachusetts*, 22 Sup. Ct. Rep. 238.

The court regards this statute as a legitimate exercise of the state's power to regulate and even to prohibit the transaction of business by foreign insurance companies within its limits. *Hooper* v. *California*, 155 U. S. 648. It has been held, however, that this power does not enable the state to forbid contracts of insurance for property within its limits when the contracts are made outside. *Allgeyer* v. *Louisiana*, 165 U. S. 578. Such a statute was regarded as violating one of the rights secured by the Fourteenth Amendment, the term "liberty" being interpreted vaguely to include an almost unlimited right to contract. *Cf. Butchers' Union, etc., Co.* v. *Crescent City, etc., Co.*, 111 U. S. 746, 762. Passing over this doubtful construction, which has been widely adopted, it would nevertheless seem that the legitimate power of a state to protect its citizens against possible insurance frauds, is sufficient to supply the requisite of "due process" in cases like *Allgeyer* v. *Louisiana*, *supra*. *Commonwealth* v. *Nutting*, 175 Mass. 154. It is to be hoped that the decision in the principal case, which sustains the application of the statute to a case in which a very small part of the transaction took place in Massachusetts, marks a tendency to limit as far as possible the effect of *Allgeyer* v. *Louisiana*.

CONTRACTS — RESTRAINT OF TRADE — LIMITATION AS TO SPACE. — The vendor of a manufacturing business covenanted not to engage in the same business within the state during a term of years *Held*, that the contract is void. *Union Strawboard Co.* v. *Bonfield*, 61 N. E. Rep. 1038 (Ill., Sup. Ct.).

The principal case defines the position of Illinois upon a growing topic in the law, by establishing as decision what had already been indicated by way of *dictum*. See *Lanzit* v. *Sefton Mfg. Co.*, 184 Ill. 326; and see also *Lufkin Rule Co.* v. *Fringeli*, 57 Oh. St. 596. The rule thus laid down, forbidding restrictions that apply throughout the jurisdiction, was once law in England, and also prevailed widely in this country. *Mitchell* v. *Reynolds*, 1 P. Wms. 181; *Taylor* v. *Blanchard*, 13 Allen (Mass.) 370. The present English doctrine, which considers restrictions as to space of importance only in their bearing upon the general question of reasonableness, was established by the decision in *Nordenfelt* v. *Maxim Nordenfelt, etc., Co.*, [1894] A. C. 535. Accordingly, restrictions covering the whole of England have been enforced. *Underwood* v.

Barker, [1899] 1 Ch. 300. Some American courts accept the English doctrine. *Oakdale Mfg. Co.* v. *Garst*, 18 R. I. 484. Others have extended the old rule so far as to make the United States, rather than the state, the maximum area over which the restriction may extend. *Diamond Match Co.* v. *Roeber*, 106 N. Y. 473; but see *Tode* v. *Gross*, 127 N. Y. 480; and see also *Beal* v. *Chase*, 31 Mich. 490. Arbitrary limitations as to space would, however, seem logically to apply only within the jurisdiction of the court imposing them. The English view seems on principle the sound one, and towards it the American decisions seem generally to be tending. See 4 HARV. L. REV. 128; *Anchor Electric Co.* v. *Hawkes*, 171 Mass. 101.

CORPORATIONS — ESTOPPEL BY ACTS OF SHAREHOLDERS. — Several persons who, as assignors of a patent, were estopped to dispute its validity, formed a corporation of which they were the sole shareholders. This corporation was sued by the assignees of the patent for an infringement. *Held*, that the corporation is bound by the estoppel. *Force* v. *Sawyer-Boss Mfg. Co.*, 111 Fed. Rep. 902 (Circ. Ct., E. D. N. Y.).

It would seem that when several persons, merely for convenience in conducting their business, form a corporation which they immediately control and intend to continue to control, and all the stock is owned by them or by others not innocent holders, the corporation ought to be bound by any estoppel, notice, or specifically enforceable negative contract by which its members were previously bound. *National Conduit Co.* v. *Connecticut Pipe Co.*, 73 Fed. Rep. 491; *Davis Co.* v. *Davis Co.*, 20 Fed. Rep. 699; *Beal* v. *Chase*, 31 Mich. 490. A rule at least as broad as this is necessary to prevent such persons from escaping their obligations under the thin disguise of incorporation. It has been held, however, that the principle of the above cases extends only to corporations formed for the purpose of escaping the restraint in question. *Moore & Handley Co.* v. *Towers Co.*, 87 Ala. 206. This restriction is not borne out by the cases as a whole and, while apparently resting solely on assumed expediency, would work injustice. The principal case therefore seems correct, although no fraudulent intent clearly appears. A much more comprehensive rule than that above is laid down by one text writer, but the authorities cited are not sufficient to sustain it in full. See 4 THOMPS., CORPS., §§ 5249, 5269.

DAMAGES — APPROPRIATION OF WATER POWER. — The plaintiff was entitled to the use of a water power, which the defendant had appropriated. The plaintiff had not desired to use the power and so had suffered no actual damage. *Held*, that the plaintiff's measure of recovery in tort is the fair rental value of the use of the water during the period it was taken. *Green Bay, etc., Water Co.* v. *Kaukauna Water Power Co.*, 87 N. W. Rep. 871 (Wis.). See NOTES, p. 577.

DAMAGES — BENEFITS — MITIGATION. — The owners of a ship had her bilge keel fitted while she was in dry dock for other repairs, for the expense of which the defendant was liable. The additional work did not cause any increase in the dock charges. *Held*, that the defendant is liable for the entire dock charges. *The Acanthus*, 112 L. T. 153 (P.). See NOTES, p. 572.

DECEIT — FALSE STATEMENT OF CONSIDERATION IN A CONVEYANCE. — The plaintiff declared that she had bought certain notes secured by property deeded to a trust company; that the consideration stated in the conveyance was grossly misrepresented by the defendant for the purpose of cheating and defrauding the plaintiff and others; that she had relied on the statement in buying the notes, and that the notes were worthless. The defendant demurred. *Held*, that the plaintiff has not stated a cause of action. *Leonard* v. *Springer*, 34 Chic. Leg. News 121 (Ill., App. Ct.). See NOTES, p. 576.

EQUITY — BILL FOR RESCISSION. — INADEQUACY OF LEGAL REMEDY. — The grantor conveyed her farm to her nephew, who in return covenanted that he would live with her on the farm and support her during the rest of her life. After performing for a few months, the nephew left the farm, and refused to carry out his covenant further. *Held*, that the grantor may have a decree declaring the deed null and void and placing the parties *in statu quo*. *Lowman* v. *Crawford*, 40 S. E. Rep. 17 (Va.).

As the performance of the covenants involved elements of personal care and attention to the grantor, as well as her continued residence in her old home, the legal remedy was in no wise adequate. Moreover, the whole purpose of the transaction had failed, and it would seem to be a proper place for equity to act. Accordingly under

like circumstances the trend of authority in this country is with the case. *Savannah, etc., Ry. Co.* v. *Atkinson*, 94 Ga. 780; *Cooper* v. *Gum*, 152 Ill. 471. Exactly the same point seems never to have come before the English courts. But, owing to their literal enforcement of the rule requiring restitution *in specie* in all cases of rescission, it seems likely that they would reach an opposite result. *Cf. Hunt* v. *Silk*, 5 East 449. The principal case seems to show a decided advantage in the more liberal construction of this rule by the American courts. *Cf. Brewster* v. *Wooster*, 131 N. Y. 473. The form of the decree, however, appears to be wrong. The deed vested the title in the grantee and, in absence of statute, it cannot be revested in the grantor except by a reconveyance. *Cf. Hart* v. *Sanson*, 110 U. S. 151. Compensation should of course be made to the grantee for services actually rendered.

EQUITY — LIQUIDATED DAMAGES — RELIEF ADDITIONAL TO INJUNCTION. — A contract of employment bound the defendant not to compete in business with the plaintiffs, within certain limits, after leaving their service, and named £100 as liquidated damages in case of breach. The defendant did compete, and the plaintiffs sued for an injunction and for the liquidated damages. *Held*, that the plaintiffs may elect either of these remedies, but cannot have both. *General Accident Assurance Corp. (Limited)* v. *Noel*, 18 T. L. R. 164 (K. B.).

Apparently the contract was interpreted to mean that the plaintiffs might, in case of a breach, compel either specific performance or payment of the liquidated sum, at their option; a payment, of course, operating to release the defendant from further obligation. *Sainter* v. *Ferguson*, 1 Mac. & G. 286. This would not be the usual alternative contract, where the option lies with the defendant, but such a construction seems necessary to support the case. If, on the other hand, the contract merely attempts to liquidate the damages, without giving an option on either side, the plaintiffs should recover only the amount of the damage actually sustained. To give the full sum after an apparently slight breach, would be enforcing a penalty and open to objection on that ground. *Lampman* v. *Cochran*, 19 Barb. (N. Y.) 388; *Kemble* v. *Farren*, 6 Bing. 141. The existence of the agreement for liquidated damages is no obstacle to granting an injunction. *Jones* v. *Heavens*, 4 Ch. D. 636; *Ropes* v. *Upton*, 125 Mass. 258. It follows that the agreement would not bar the compensation for past damage usually given with such an injunction. Under either construction of the contract, the injunction should carry with it this compensation as additional relief.

EVIDENCE — CRIMINAL CONVERSATION — STATEMENTS MADE BY PLAINTIFF'S WIFE TO THIRD PERSONS. — *Held*, that in an action for criminal conversation, brought by a husband, oral statements made by the wife to third persons in the absence of both the plaintiff and the defendant, indicating the state of the wife's feelings toward the husband, are not admissible. *Billings* v. *Albright*, 66 N. Y. App. Div. 239.

The relations between the husband and the wife before and, according to some authorities, after the defendant's interference are to be considered by the jury in determining the amount of damages. *Harter* v. *Crill*, 33 Barb. (N. Y.) 283; *Prettyman* v. *Williamson*, 1 Pen. (Del.) 224. The feeling of the wife toward the husband is therefore directly in issue. The mental condition of a person at any particular time may be proved by his declarations made at that time. *Mutual Life Ins. Co.* v. *Hillmon*, 145 U. S. 285. The court in the principal case recognizes this rule by admitting the statements of the wife to the husband to prove her feeling toward him; and no good reason appears for distinguishing her declarations to third persons. The court excludes them on the ground of the danger of collusion. This danger is equally present in admitting statements made to the husband, and in case of declarations prior to the misconduct, is not serious. The weight of authority is in favor of admitting such declarations. *Palmer* v. *Crook*, 73 Mass. 418. The tendency is to exclude statements after the act, though if the subsequent relation between husband and wife is in issue, they are admissible in theory and should be received on proof of good faith.

INSURANCE — EVIDENCE — PAROL EVIDENCE RULE APPLIED TO INSURANCE POLICY. — An insurance policy contained a provision that the insurer should not be liable if other insurance existed upon the property covered by the policy. *Held*, in an action upon the policy, that this provision cannot be avoided by evidence that the agent of the insurer who issued the policy, knew of the existence of other insurance at the time of its issuance. *Northern Assurance Co.* v. *Grand View Bldg. Assoc.*, 22 Sup. Ct. Rep. 133. See NOTES, p. 575.

INSURANCE — INSURABLE INTEREST — POSSESSION. — One in possession of land, but not claiming title, insured buildings thereon under a *bona fide* belief that he owned the buildings. *Held*, that he may recover on the policy. *American, etc., Co.* v. *Donlan*, 66 Pac. Rep. 249 (Col., C. A.). See NOTES, p. 573.

INSURANCE — MISSTATEMENTS IN APPLICATION — BLANKS FILLED BY AGENT. — An agent, appointed to solicit insurance, forwarded to his company an application for an accident insurance policy, purporting to contain the answers of the applicant to the questions contained therein. It was in fact filled out by the agent, and the applicant signed it without reading it. Some of the answers were untrue in material respects, owing to the fraud or gross negligence of the agent. Upon the basis of this application a policy was issued. *Held*, that no recovery can be had on the policy. *Biggar* v. *Rock, etc., Co.*, 18 T. L. R. 119 (K. B.).

Despite the misrepresentations, the company should be bound if it is affected with the knowledge of the agent. See NOTES, p. 575. This would be true if he had a share in the making of the contract, or if it was one of the duties of his employment to report upon matters connected with the application. See *Smith* v. *Farmers', etc., Co.*, 89 Pa. St. 287; 15 HARV. L. REV. 489. But such agents by general custom have very limited authority. See *McCoy* v. *Metropolitan, etc., Co.*, 133 Mass. 82. Accordingly knowledge on their part has been held immaterial. *Ryan* v. *World, etc., Co.*, 41 Conn. 168. Such a view seems correct in the principal case, where apparently the agent's duty was merely to solicit and forward applications; so it is enough to defeat the policy that it was issued on the basis of representations materially untrue. *Vose* v. *Eagle, etc., Co.*, 6 Cush. (Mass.) 42. The court reaches the same result by considering the agent as the plaintiff's agent in making out the application. This view, though not generally accepted, is supported by some authority. *Wilson* v. *Conway, etc., Co.*, 4 R. I. 141; but *cf. Jordan* v. *State Ins. Co.*, 64 Ia. 216. It is also defensible on theory, as an agent may act for two parties where his duties do not require him to perform incompatible acts. *Hinckley* v. *Arey*, 27 Me. 362. The decision, thus supportable on two grounds, is nevertheless against the weight of authority. See *Rockford Ins. Co.* v. *Nelson*, 75 Ill. 548; but *cf. New York, etc., Co.* v. *Fletcher*, 117 U. S. 519. The plaintiff should, in any case, recover the premiums paid. *New York, etc., Co.* v. *Fletcher*, *supra*.

MORTGAGES — ASSIGNEE ASSUMING MORTGAGE DEBT — PAYMENT BY MORTGAGOR. — The plaintiff, having mortgaged his land, made a conveyance to the defendant, who promised to pay the mortgage. The plaintiff paid the mortgage debt after maturity, and had the mortgage discharged of record. He then sued the defendant for the amount paid. *Held*, that the court should not have directed a verdict for the plaintiff. *Keller* v. *Lee*, 66 N. Y. App. Div. 184.

The court, to support its opinion, cites various New York cases which say that the land is the primary fund for the debt, and that the purchaser's contract is only to indemnify the mortgagor in case the land does not satisfy the debt, and the mortgagor is obliged to pay. On this ground specific performance of the purchaser's promise has been refused. *Slauson* v. *Watkins*, 86 N. Y. 597. Yet the original mortgagor was under a personal obligation to the mortgagee. *Cf. Jackson* v. *Bevins*, 49 Atl. Rep. 899 (Conn.). This the mortgagee has never released, nor has he bound himself first to seek satisfaction from the land. Moreover a mortgagee has been allowed to recover on a purchaser's promise without foreclosure. *Thorp* v. *Keokuk Coal Co.*, 48 N. Y. 253; *Beeson* v. *Green*, 103 Ia. 406. Further, recovery by the mortgagor against the purchaser has been allowed even before the former has paid. *Baldwin* v. *Emery*, 89 Me. 496. These cases show that the purchaser is under a personal obligation for the whole debt. As between themselves the mortgagor is in the position of a surety for the purchaser. *Murray* v. *Marshall*, 94 N. Y. 611. The plaintiff's payment of an obligation on which he was personally liable, as in the case of an ordinary surety, cannot be regarded as voluntary. *Cf. Pitt* v. *Purssord*, 8 M. & W. 538. The mortgagor should therefore get indemnity; and this has generally been allowed when he has had to pay. *Bolles* v. *Beach*, 22 N. J. Law 680; *Lappen* v. *Gill*, 129 Mass. 349.

MUNICIPAL CORPORATIONS — LIMITATION OF INDEBTEDNESS — OBLIGATION ENFORCEABLE UP TO LIMIT. — The defendant school district contracted to buy from the plaintiff the material for a building, thereby increasing its indebtedness beyond the constitutional limit. *Held*, that the plaintiff, after completion of the building, can

recover on the contract that amount for which the district could legally have become indebted. *McGillivray* v. *Joint School Dist.*, 88 N. W. Rep. 310 (Wis.).

The general rule is well established that a municipal corporation, having incurred an obligation which increases its indebtedness beyond the constitutional limit, is liable up to such limit. *Francis* v. *Howard County*, 50 Fed. Rep. 44. The weight of authority is in accord with the principal case in applying the rule even to indivisible contracts, when fully performed by the other party. *Culbertson* v. *City of Fulton*, 127 Ill. 30; *School Town of Winamac* v. *Hess*, 151 Ind. 229. Some authorities, however, under such circumstances distinguish divisible and indivisible contracts and hold the latter wholly void. See *Hedges* v. *Dixon County*, 150 U. S. 182; *Board, etc., of Lake County* v. *Standley*, 24 Col. 1. The distinction does not seem justified. It is the incurring of the indebtedness which is prohibited by the constitution, and the contract or bonds are valid, though unenforceable as to the excess. The defence is that of legal impossibility, and should be good only as to the part made impossible. The indivisibility of the contract is then immaterial and should not affect the obligee's right. The result is peculiarly just in the principal case, since it is free from the difficulty present in the common case of an issue of bonds, in which the loss must be divided among different obligees.

MUNICIPAL CORPORATIONS — POLICE POWER — ALIGHTING FROM MOVING TRAINS. — Under a charter giving power to pass all necessary police ordinances, the city of Chicago passed an ordinance making it illegal for persons to get on or off moving trains without permission of those in charge. *Held*, that the ordinance is invalid as not being a necessary police regulation. *Wise* v. *Chicago & N. W. Ry. Co.*, 61 N. E. Rep. 1084 (Ill., Sup. Ct.).

As the court very properly considers "necessary police ordinances" to mean police ordinances reasonably conducive to the morals, safety, and good order of the general public, the question reduces itself to whether the matter regulated here falls within the police power. The courts of Illinois have always taken a narrow view as to the scope of this power. *Toledo Ry. Co.* v. *Jacksonville*, 67 Ill. 37; *Ritchie* v. *People*, 155 Ill. 98. In the present case, however, the court would seem to be following a well defined public sentiment. Courts have a prejudice, common in all American communities, against interference with personal liberty in matters of this character, by legislation which they consider as designed primarily to protect the individual against himself without sufficient public end. So in the only case found dealing with an ordinance closely similar to that in the principal case, the same view was taken. *Mills* v. *Missouri, etc., Ry. Co.*, 59 S. W. Rep. 874 (Tex.); *cf. Ex parte Smith*, 135 Mo. 223. Considered more broadly, however, such laws may fairly be treated as within the power to guard the safety of the community. *Cf. Ah Lim* v. *Territory of Washington*, 1 Wash. St. 156; *Birkett* v. *Chatterton*, 13 R. I. 299. The decisions on the validity of the eight-hour laws would seem to be in point. See 12 HARV. L. REV. 61; 13 *Ibid.* 222.

PERSONS — INFANTS — LIABILITY IN TORT. — The defendant, an infant, contracted to thresh grain stored in a building upon the plaintiff's land. Owing to the defendant's negligence in the conduct of the work, the grain and the building containing it were destroyed by fire. *Held*, that the defendant is not liable in an action of tort. *Lowery* v. *Cate*, 64 S. W. Rep. 1068 (Tenn.).

The general rule that an infant is liable for his torts, is subject to the rather indefinite qualification, that when the tort arises in connection with a contract, he is commonly held not liable. See *Schenk* v. *Strong*, 4 N. J. Law 87. In certain cases, however, of fraud and wilful wrongdoing this qualification is more or less generally held to be inapplicable. See 14 HARV. L. REV. 71; *Burnard* v. *Haggis*, 14 C. B. N. S. 45; but *cf. Penrose* v. *Curren*, 3 Rawle (Pa.) 351. But in actions based on negligence involved in acts performed under the contract, the infant is held not liable, on the ground that such actions are virtual evasions of his right to avoid his contracts. See *Jennings* v. *Rundall*, 8 T. R. 335. This reason is applicable only when the damage suffered would be recoverable in contract against an adult. Assuming that to be true in the principal case, it may still be distinguished as being the only case found where there was injury to property not concerned in the contract, and courts might well go so far as to allow recovery under such circumstances. No decisions can be cited sustaining this distinction, but it accords with the tendency shown by some courts to restrict the infant's immunity from the consequences of his wrongful acts. See *Kilgore* v. *Jordan*, 17 Tex. 341; *Rice* v. *Boyer*, 108 Ind. 472.

PERSONS — INFANTS' CONTRACTS — AVOIDANCE DURING MINORITY. — A minor, having been injured by the fault of a railway company, accepted a sum of money in full discharge of the company's liability. While still an infant she sued in tort, asserting her disaffirmance of the contract of compromise. *Held*, that she cannot avoid the contract while within age. *Lansing* v. *Michigan Cent. Ry. Co.*, 86 N. W. Rep. 147 (Mich.).

Earlier authorities in the same state have gone as far as this case goes. *Dunton* v. *Brown*, 31 Mich. 182. Elsewhere it is well settled that an infant may avoid his contracts while within age. *Stafford* v. *Roof*, 9 Cow. (N. Y.) 626. On the other hand it is universally held that an infant may not conclusively avoid his conveyances of land until he is of age. *Zouch* v. *Parsons*, 3 Burr. 1794. But this inconsistency is only an apparent one, since the infant may enter and take profits during his minority, exercising his election when reaching full age. *Bool* v. *Mix*, 17 Wend. (N. Y.) 119. The principal case goes on the ground that the want of discretion that prevents an infant from making a binding contract should also prevent him from disaffirming one that may be beneficial to him. But the loss that he may often suffer by being held to disadvantageous contracts until of age, would seem a weightier consideration than the danger of losing benefits by unwise disaffirmance. The rule in the principal case seems never to have been carried to the length of allowing judgment to go against an infant in suit on the contract, and it is doubtful if any court would carry it so far.

PROPERTY — BAILMENTS — ACTION BY BAILEE AGAINST THIRD PERSON. — Property in the hands of a bailee was destroyed by the negligence of a third person. *Held*, that the bailee is entitled to recover the value of the property, though before such recovery he would have a good answer to an action by the bailor. *The Winkfield*, 18 T. L. R. 178 (Eng., C. A.).

The decision in the principal case is in accord with American authority and with the early cases in England. *Ullman* v. *Barnard*, 7 Gray (Mass.) 554; *Burton* v. *Hughes*, 2 Bing. 173; *Swire* v. *Leach*, 18 C. B. N. S. 479. Furthermore it would seem to be sound historically. See HOLMES, COMMON LAW, ch. 5. Originally the bailee alone could sue the wrongdoer, since he alone had possession; though after recovery he was liable to account to his bailor. At a later day the bailor was allowed to recover against the wrongdoer, provided he brought suit before the bailee. Then, by a curious inversion of reasoning, it came in time to be held that a bailee could not recover the value of the property in a suit against the wrongdoer, unless, even without such recovery, the bailee would himself be liable in an action by his bailor. *Heydon and Smith's Case*, 13 Co. 67, 70. This inverted reasoning was the *ratio decidendi* in the leading English case, which was thought to have fixed the law to the effect that a bailee could recover only the damage to his own interest. *Claridge* v. *South Staffordshire Tramway Co.*, [1892] 1 Q. B. 422. See 6 HARV. L. REV. 156. By expressly overruling that decision, the Court of Appeal in the principal case has restored the orthodox doctrine on this point.

PROPERTY — SALE BY TENANT IN COMMON — TROVER AGAINST PURCHASER. — A tenant in common of land, without the consent of his co-tenant, gave the defendant a license to cut timber on the land and take it for his own exclusive use. The defendant did so. *Held*, that the injured co-tenant may recover for conversion. *Sullivan* v. *Sherry*, 87 N. W. Rep. 471 (Wis.).

The general American rule is that a tenant in common of personalty who sells the entire property without authority, is liable in trover to his co-tenant. *Weld* v. *Oliver*, 21 Pick. (Mass.) 559. Several courts, while adopting this rule, have protected the purchaser on the ground that the sale passed only the moiety of his vendor, making him merely a co-tenant with the plaintiff. *Dain* v. *Cowing*, 22 Me. 347. See *Osborn* v. *Schenck*, 83 N. Y. 201. This doctrine has been applied to divisible as well as indivisible chattels. *Kilgore* v. *Wood*, 56 Me. 150. The proposition, however, that such a conveyance, not in market overt, may be tortious on the side of the grantor, but innocent on that of the grantee, seems indefensible; and in general, exclusion under a claim of title from a wrongful grantor is sufficient to support trover. *Hollins* v. *Fowler*, L. R. 7 H. L. 757. The fact that the defendant in the principal case claims, not under an ordinary sale of chattels, but under a license to cut and remove timber, seems not to affect the principles applicable. The decision accords with the generally recognized principle of *Hollins* v. *Fowler*, *supra*, and is supported by one parallel case. *Van Doren* v. *Balty*, 11 Hun (N. Y.) 239.

PROPERTY — STATUTE OF LIMITATIONS — RIGHT TO SUPPORT OF LAND. — The defendant made excavations in his coal mines beneath the plaintiff's land, and thereby caused the surface to cave in. *Held*, that the plaintiff's right of action accrued, not at the time of subsidence, but at the time of mining. *Noonan* v. *Pardee*, 50 Atl. Rep. 255 (Pa.). See NOTES, p. 574.

PROPERTY — TRANSFER OF TITLE AFTER JUDICIAL SALE — RELATION. — The interest of the assignee of a lease was sold under a judicial decree, but no deed was given to the purchaser. Later the assignee was sued for rent due since the sale, upon the covenant in the lease. After the beginning of the action a deed was given to the purchaser. *Held*, that the deed, operating by relation, divested the defendant of his legal title from the date of the sale, and is therefore a good defence. *Mayor of Baltimore* v. *Peat*, 50 Atl. Rep. 152 (Md.).

Deeds of property sold at judicial sales are generally held to vest the title in the purchaser from the time of the sale. *Pennsylvania S. V. R. R. Co.* v. *Cleary*, 125 Pa. St. 442. But the doctrine of relation is not considered applicable when it will injure the preëxisting rights of a third person. *Jackson* v. *Bard*, 4 Johns. (N. Y.) 230. It is difficult to see why in the principal case the rights of the plaintiff are not injured by allowing the deed to relate back, since he is put to the expense of two actions and exposed to the uncertainty of recovery against another person. But even were this reason invalid, it is doubtful if the doctrine of relation should be applied where the act the effect of which must be carried back, is done after the beginning of the action. Some jurisdictions have permitted such a use of the principle. *Jackson* v. *Ramsay*, 3 Cow. (N. Y.) 75. Other cases have held, more properly it would seem, that the fiction cannot be used to prove something which was untrue at the time the action was begun, as this would be an unnecessary and illogical extension of the doctrine. *Presnell* v. *Ramsour*, 8 Ired. (N. C.) 505.

PUBLIC SERVICE COMPANIES — REFUSAL TO FURNISH NATURAL GAS — INSUFFICIENT SUPPLY. — The defendant, a natural gas company exercising the right of eminent domain, refused to furnish gas to the plaintiff, owing to an unavoidable deficiency in its supply. *Held*, that the plaintiff must be supplied with gas, even though serious inconvenience to prior consumers results. *State ex rel. Wood* v. *Consumers' Gas Trust Co.*, 61 N. E. Rep. 674 (Ind., Sup. Ct.). See NOTES, p. 571.

SALES — CHATTEL MORTGAGES — POTENTIAL EXISTENCE. — In a jurisdiction in which a chattel mortgage passes only a legal lien, and not the title, a mortgage of certain hogs and of their increase was given to the plaintiff. Before foreclosure the defendant attached the young of the hogs, born after the execution of the mortgage. *Held*, that the plaintiff has no right, as against the defendant, to the young of the animals. *Battle Creek Valley Bank* v. *First Nat. Bank*, 88 N. W. Rep. 145 (Neb.).

That legal rights may be passed in the future increase of property already owned, is a generally recognized doctrine. *Grantham* v. *Hawley*, Hob. 132. So it has been held that the unborn offspring of animals may be sold, and the title passes when they are born. *Hull* v. *Hull*, 48 Conn. 250. The same rule has been applied to chattel mortgages, in jurisdictions where a mortgagee gets title. *Rogers* v. *Highland*, 69 Ia. 504. So, too, it has been held that a lien may be given on unborn animals. *Sawyer* v. *Sawyer*, 70 Me. 254. Although there has been some tendency to limit, in various ways, the application of the doctrine under discussion, there seems to be no authority and no valid reason for distinguishing in this regard between lien and title, as is done in the principal case. The court mainly relies upon a case in which the young were not included in the terms of the mortgage, and which therefore is hardly authority. *Shoobert* v. *De Motta*, 112 Cal. 215. The question has been decided in the opposite way in another jurisdiction, according to what would seem the better reason. *First Nat. Bank* v. *Western Mortgage Co.*, 86 Tex. 636. No other exactly parallel cases have been found.

SALES — DAMAGES — BREACH OF WARRANTY. — The plaintiff sold a machine to the defendant, warranting it to be of a certain capacity. There was in fact no machine on the market of such capacity. *Held*, that the measure of damages for the breach of warranty is the difference between the purchase price and the actual value of the machine as delivered. *Huyett-Smith Mfg. Co.* v. *Gray*, 40 S. E. Rep. 178 (N. C.).

Where a purchaser seeks redress for a breach of a contract of warranty, the better rule is that the measure of damages is the difference between the value of the article

as delivered and its value had it been as represented. See 14 HARV. L. REV. 454; *Tuttle* v. *Brown*, 4 Gray (Mass.) 457; but *cf. Van Winkle* v. *Wilkins*, 81 Ga. 93. Where, however, the ascertainment of damages on this basis would be clearly only matter of conjecture, the rule sometimes breaks down. *Ferris* v. *Comstock*, 33 Conn. 513. No such difficulty appears, however, in the principal case. Ordinarily the value of the article as represented is proved by showing the market value of such commodities. See *Bach* v. *Levy*, 101 N. Y. 511. Where articles such as were contracted for are not on the market, the mode of proof may be affected, but the measure of damages should not ordinarily be changed. In such cases the contract price, which is always admissible to show the value of the thing contracted for, becomes important evidence as to that value. See *Cary* v. *Gruman*, 4 Hill (N. Y.) 625; *Tatum* v. *Mohr*, 21 Ark. 349. It is not, however, conclusive. *Willis* v. *Dudley*, 10 Ala. 933. In the principal case it would seem a simple matter to prove by expert evidence the value of a machine having the capacity warranted. *Cf. Willis* v. *Dudley*, *supra*.

SALES — MORTGAGE OF AFTER-ACQUIRED PROPERTY — EQUITABLE LIEN. — *Held*, that a mortgage of securities to be thereafter issued gives a valid equitable lien, which attaches to the securities as soon as they come into the mortgagor's hands. *Central Trust Co. of New York* v. *West India Improvement Co.*, 169 N. Y. 314.

The New York court has fluctuated between the view that a mortgage of after-acquired property gives a valid equitable lien, and the view that, as against third persons, the mortgagee acquires no rights, unless he takes possession of the property before their rights attach. The decision in the principal case is rested on the authority of the older cases. *McCaffrey* v. *Woodin*, 65 N. Y. 459; *Kribbs* v. *Alford*, 120 N. Y. 519. It is not noticed that the more recent New York decisions are based upon the other view. *Rochester Distilling Co.* v. *Rasey*, 142 N. Y. 570; *New York, etc., Co.* v. *Saratoga, etc., Co.*, 159 N. Y. 137. The weight of authority, however, both in England and in the United States, supports the principal case. *Holroyd* v. *Marshall*, 10 H. L. Cas. 191; *Mitchell* v. *Winslow*, 2 Story (U. S. Circ. Ct.) 630; *Cumberland Nat. Bank* v. *Baker*, 57 N. J. Eq. 231; but see, *contra*, *Moody* v. *Wright*, 13 Met. (Mass.) 17. On equitable principles the prevailing view would seem to be sound. The question is generally of importance only when the mortgagor becomes insolvent; and in that case, if the mortgagee is denied a lien, he is deprived of the security by which he was induced to advance his money, while the debtor's estate has the benefit of both the money and the property. Obviously, however, the mortgagee's equitable lien cannot prevail against *bona fide* purchasers for value.

SALES — STATUTE OF FRAUDS — WRITTEN MEMORANDUM AND SUBSEQUENT ORAL MODIFICATION. — A seller being unable to continue prompt deliveries of flour under a written contract, the parties orally agreed upon a definite postponement of future deliveries. The seller, suing on the original contract, proved the oral transaction to excuse his non-performance of the written terms. *Held*, that the transaction shows no sufficient excuse. *Walter* v. *Bloede Co.*, 50 Atl. Rep. 433 (Md.).

Assent to postponement presumably did not bind the defendant as a waiver, for the court does not discuss it as such, and it was probably seasonably retracted. The plaintiff should succeed, then, only if the oral agreement postponing deliveries was enforceable as a contract. According to some American cases the Statute of Frauds does not affect such an agreement, it being styled a contract merely for a substituted performance. *Cummings* v. *Arnold*, 3 Met. (Mass.) 486; *Clark* v. *Dales*, 20 Barb. (N. Y.) 42. The English courts and some of our states have adopted an extremely opposite doctrine, that any subsequent oral contract is invalid, except one simply rescinding an executory contract to sell. *Stead* v. *Dawber*, 10 A. & E. 57; *Bailey* v. *Epperly*, 2 Ind. 85. This rule is perhaps too broad, for the question is always whether a given substitutionary contract is for the sale of goods. See *Tyers* v. *Rosedale, etc., Co.*, L. R. 8 Ex. 305, 318. The English rule is applied in the principal case, where the result reached is correct. The oral contract had two parts, a rescission of the promises of deliveries and payments on the dates first set, and new promises for deliveries and payments on other dates. This latter part was a contract for a sale, and therefore within the statute.

STATUTE OF LIMITATIONS — AMENDMENT OF DECLARATION AFTER STATUTORY PERIOD. — A statute authorized administrators to sue for the benefit of heirs at law in cases of wrongful death. Within the statutory period an administrator brought an action, failing to name the beneficiaries as required. After the statute had run, he

amended his declaration by inserting the names of the beneficiaries. *Held*, that the statutory bar cannot be interposed. *Love* v. *Southern Ry. Co.*, 65 S. W. Rep. 475 (Tenn., Sup. Ct.).

Whether amendments are to be allowed or refused is almost wholly within the discretion of the court. *Chirac* v. *Reinsicker*, 11 Wheat. (U. S.) 280. But modern authorities greatly favor allowing them to prevent failure of justice. *Stebbins* v. *Lancashire Ins. Co.*, 59 N. H. 143. The fact that the statutory period has expired while the suit is pending is regarded as a strong reason for allowing the amendment. *Sanger* v. *Newton*, 134 Mass. 308. In such cases the running of the statute is arrested at the date of filling the original pleading, unless the amendment sets up a new cause of action or introduces new parties. *Blanchard* v. *Lake Shore, etc., Ry. Co.*, 126 Ill. 416; *Hills* v. *Ludwig*, 46 Oh. St. 373; *Flatley* v. *Memphis, etc., Ry. Co.*, 9 Heisk. (Tenn.) 230. The amendment in the principal case does not introduce new parties, as the action is continued in the name of the administrator, the heirs at law being named only as beneficiaries. Nor does it seem that in any real sense a new cause of action is set up. The amendment cures a purely formal defect, and both declarations are obviously based on the same cause of action. The case reaches a very desirable result and is supported by good authority. *South Carolina Ry. Co.* v. *Nix*, 68 Ga. 572; *Huntingdon, etc., Ry. Co.* v. *Decker*, 84 Pa. St. 419. There is, however, some authority the other way. *Atlanta, etc., Ry. Co.* v. *Hooper*, 92 Fed. Rep. 820.

STATUTE OF LIMITATIONS — APPLICATION TO BILL TO REMOVE CLOUD ON TITLE. — Neb. Code, § 16, enacts that "An action for relief not hereinbefore provided for, can only be brought within four years after the cause of action shall have accrued." § 2 abolishes the distinction between actions at law and suits in equity. *Held*, that the statute constitutes no defence to a suit to remove a cloud on title. *Batty* v. *City of Hastings*, 88 N. W. Rep. 139 (Neb.).

Statutes of limitations formerly applied expressly only to actions at law, but the spirit of these statutes is followed in equity, and at the present day they often in terms include equitable suits. WOOD, LIM., § 58. While at law a cause of action must be a breach of legal duty, in equity a suit may be brought to procure a deserved benefit or to relieve from hardship, without any previous wrongful act on the part of the defendant. The question then arises whether the causes of action in suits of the latter class are within the statutes. The authority, though scanty, seems uniformly opposed to such a view. *Schoener* v. *Lissauer*, 107 N. Y. 111. The reasons on which the statutes are based have very little application to cases of this class, and the fact that the outstanding claim is an old one makes its cancellation no less just and desirable. In the principal case therefore the decision, though not founded on a literal construction, seems not to conflict with the intention of the statute. The plaintiff may of course still be barred, if guilty of laches.

BOOKS AND PERIODICALS.

INSANITY IN RELATION TO CONTRACTS. — It is the law of England that an insane person is liable upon his contracts as if sane unless, in addition to his own insanity, he proves that the other party knew of his condition. *Imperial Loan Co.* v. *Stone*, [1892] 1 Q. B. 599. This decision, though previously assailed in England, finds support in a recently published article. *Lunacy in Relation to Contract, Tort, and Crime*, by Rankine Wilson, 18 L. Quart. Rev. 21 (Jan., 1902). In Mr. Wilson's view the case decides merely that insanity shall not be a defence unless the "party alleging it was so insane as not to be capable of understanding what he was about," and then goes on to establish a test of such insanity which shall be "whether the other party can be affected with knowledge." It requires no little ingenuity to find in the language of the decision any indication that such was the meaning of the court. ANSON, CONTS., 9th ed., 125. The defendant, by hypothesis, having already proved that he was incapable of understanding what he was about, no test by means of which that